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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 QUINSTREET, INC., a California
12 Corporation,

13 Plaintiff,

14 v.

15 MARK FERGUSON d/b/a WHEW.COM, an
16 individual,

17 Defendant.

CASE NO. C08-5525RJB

**ORDER ON DEFENDANT
FERGUSON'S MOTION FOR
SUMMARY JUDGMENT**

18 This matter comes before the Court on Defendant Ferguson's Motion for Summary
19 Judgment (Dkt. 44), QuinStreet's Motion pursuant to Fed. R. Civ. P. 56(f) (Dkt. 49),
20 Defendant's Motion for Reconsideration (Dkt. 51), and QuinStreet's Motion to Strike (Dkt. 52).
21 The Court has considered the pleadings filed in support of and in opposition to these motions and
the file herein.

22 **I. FACTUAL AND PROCEDURAL BACKGROUND**

23 **A. FACTS**

24 On January 23, 2009, this Court entered an Order on QuinStreet's Motion to Dismiss
25 Defendant's Counterclaim, Motion for a More Definite Statement, Motion to Strike and Various
26 Other Motions by Defendant ("January 2009 Order"). Dkt. 39. On March 30, 2009, this Court
27 granted QuinStreet, Inc.'s third Motion to Dismiss Defendant's Counterclaim ("March 2009
28

Order”). Dkt. 48. The facts and procedural history are recounted at length in the January and March 2009 Orders and are adopted here by reference. *Id.*, at 1-3.

Trial is set for October 19, 2009. Dkt. 32. Discovery is to be completed by June 22, 2009, and dispositive motions are to be filed by July 21, 2009. *Id.*

B. PENDING MOTIONS

Defendant now moves for summary dismissal of QuinStreet’s claims pursuant to Fed. R. Civ. P. 56. Dkt. 44. Defendant states “[t]his Court determined the subject statements to be protected under the First Amendment (Dkt. #30) and not actionable as a matter of law.” *Id.* Under the heading “Defamation *Per Se*,” Defendant further argues that “Plaintiff has not demonstrated that any other individual ever viewed the statements, . . . understood the content to be about Plaintiff, understood the Plaintiff committed perjury, or that any of the statements were untrue.” Dkt. 44, at 6.

Under the heading “Tortuous [sic] Interference with an Existing Contract,” Defendant argues that Plaintiff “has not demonstrated that Defendant was aware of any contracts, . . . that Defendant contacted any ‘third party and/or persons,’ or that Plaintiff has been damaged so that claim can not survive. *Id.*

Under the heading “Intentional Interference with Prospective Economic Advantage,” Defendant argues that Plaintiff has “not demonstrated the Defendant knew of any contracts with any third parties” or “business relationships.” *Id.* Defendant argues that Plaintiff has not shown that Defendant’s “acts were designed to intentionally disrupt any business relationship” or that any business relationship was disrupted. *Id.* He argues that Plaintiff has not shown that he was the “proximate cause” of any damages. *Id.*

QuinStreet files a Response, arguing that Defendant misrepresents this Court’s prior ruling, his motion is premature because critical discovery is pending, his arguments are entirely conclusory, and are not supported by any facts or reasoned argument. Dkt. 49. QuinStreet makes a motion pursuant to Fed. R. Civ. P. 56 (f). *Id.* Further, QuinStreet argues that there are triable

1 issues of fact as to its defamation, intentional interference with contractual relations, and
2 intentional interference with prospective economic claims. *Id.*

3 Defendant replies, arguing that QuinStreet has not proven each element of each claim.
4 Dkt. 51. Defendant discusses QuinStreet's responses to his Interrogatories. *Id.* Defendant raises
5 complaints about the difficulty pleading his counterclaim with particularity. *Id.* Defendant cites
6 to Washington's criminal code for malicious prosecution and perjury in the first degree. *Id.*
7 Defendant asks the Court to reconsider its Order on QuinStreet Inc.'s Motion to Dismiss
8 Defendant's Counterclaim (Dkt. 48). *Id.* Defendant further states that,

9 Due to a miscommunication [sic] between [Defendant] and this Court, [Defendant]
10 not understanding the Court's knowledge was insufficient and the Court required
11 specific information to attribute the 'subject' spam to QuinStreet; [Defendant]
12 believed the Court had greater knowledge of the Internet, the Domain Name
13 System, the IP allocation process and so presented evidence that clearly
14 demonstrated QuinStreet owned, operated, maintained and controlled the domains
15 the spam ultimately redirected to, QOUCES.COM, DEVRY-DEGREES.COM,
16 and QSSTATS.COM, all of these domains are located in IP space NapNet had
17 allocated to QuinStreet, [Defendant] was unaware the Court was unable to make
18 that connection.

19 *Id.*, at 8-9.

20 Parties should be aware that it is not the Court's role to find and present evidence.
21 Defendant has attached pleadings he alleges are evidence to support his counterclaims. "Exhibit
22 A" of these pleadings is unintelligible to the Court. Dkt. 51-2. "Exhibit B" purports to explain
23 "Exhibit A," but does not provide a clear explanation, and certainly does not identify Defendant's
24 proposed counterclaim. Dkt. 51-3.

25 QuinStreet files a Surreply and requests the Court strike the evidence attached to
26 Defendant's Reply submitted to support his dismissed counterclaims. Dkt. 52. QuinStreet argues
27 that this evidence is newly submitted in the Reply and is not related to the Motion for Summary
28 Judgment. *Id.* QuinStreet also points out that Defendant's Reply raises completely new
arguments regarding the status of discovery and whether the Court should reconsider the decision
to dismiss his counterclaims for failing to plead his CEMA/CPA claims with particularity. *Id.*

1 Defendant files a pleading entitled “Opposition to QuinStreet’s Surreply.” Dkt. 54. In
2 this pleading, Defendant objects to QuinStreet’s Motion to strike the evidence attached to his
3 Reply which he alleges support his counterclaims. *Id.* He states that he “is still unable to identify
4 the **ACTUAL spam sender** but was able to identify the client as Plaintiff, demonstrating the
5 **DECEPTIVE** nature of the spam.” *Id.* He argues QuinStreet still has not provided evidence of
6 their claims. *Id.* Plaintiff questions “[w]hat exactly has this Court done to determine anything as
7 to the basis of [QuinStreet’s] claims?” *Id.*

8 This opinion will first address Defendant’s Motion for Summary Judgment (Dkt. 44) and
9 QuinStreet’s Motion Pursuant to Rule 56 (f) (Dkt. 49), then Defendant’s Motion for
10 Reconsideration (Dkt. 51), and QuinStreet’s Motion to Strike (Dkt. 52).

11 **II. DISCUSSION**

12 **A. SUMMARY JUDGMENT MOTION AND MOTION UNDER FED. R. CIV. 13 P. 56 (f)**

14 Summary judgment is proper only if the pleadings, depositions, answers to interrogatories,
15 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as
16 to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
17 P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party
18 fails to make a sufficient showing on an essential element of a claim in the case on which the
19 nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).
20 There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a
21 rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith*
22 *Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant
23 probative evidence, not simply “some metaphysical doubt.”); *See also* Fed. R. Civ. P. 56(e).
24 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting
25 the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth.
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec.*
27 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

1 The determination of the existence of a material fact is often a close question. The court
2 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
3 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*
4 *Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of
5 the nonmoving party only when the facts specifically attested by that party contradict facts
6 specifically attested by the moving party. The nonmoving party may not merely state that it will
7 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
8 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
9 Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be
10 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

11 Fed. R. Civ. P. 56(f), “When Affidavits Are Unavailable,” provides that:

12 If a party opposing the motion shows by affidavit that, for specified reasons, it
13 cannot present facts essential to justify its opposition, the court may:

- 14 (1) deny the motion;
- 15 (2) order a continuance to enable affidavits to be obtained, depositions to
16 be taken, or other discovery to be undertaken; or
- 17 (3) issue any other just order.

18 Plaintiff’s motion pursuant to Fed. R. Civ. P. 56 (f) should be granted, and Defendant’s
19 Motion for Summary Judgment should be denied without prejudice. Plaintiff has shown that
20 parties have a great deal of discovery yet to do. For example, to survive summary judgment on its
21 defamation claim, Plaintiff must raise issues of fact as to the following elements: falsity, an
22 unprivileged communication, fault, and damages. *Mark v. Seattle Times*, 96 Wash.2d 473, 486
23 (1981). The following are the elements need to make a claim for intentional interference with
24 contractual relations: 1) existence of a valid contractual relationship, 2) that the defendant had
25 knowledge of that relationship, 3) intentional interference inducing or causing a breach or
26 termination of the relationship, 4) that the defendant interfered for an improper purpose or used
27 improper means, and 5) resulting damage. *Commodore v. University Mechanical Contractors,*
28 *Inc.*, 120 Wash.2d 120, 137 (1992). Defendant’s knowledge is key to each of these claims.
QuinStreet states that it has not yet received Defendant’s responses to written discovery and has

1 not had an opportunity to depose Defendant. Accordingly, Defendant's Motion for Summary
2 Judgment should be denied without prejudice, to be renewed, if he so chooses, when appropriate.

3 **B. MOTION FOR RECONSIDERATION**

4 Local Fed. R. Civ. P. 7(h) provides in relevant part as follows:

5 Motions for reconsideration are disfavored. The court will ordinarily deny such motions
6 in the absence of a showing of manifest error in the prior ruling or a showing of new facts
or legal authority which could not have been brought to its attention earlier with
reasonable diligence.

7 To the extent that Defendant moves for reconsideration (Dkt. 51) of the Court's order
8 dismissing his counterclaims, his motion should be denied. Defendant has not shown a manifest
9 error in the prior ruling or new facts or legal authority which could not have been brought to the
10 court's attention earlier with reasonable diligence.

11 To the extent that Defendant is moving to amend his answer and again attempt to plead
12 his counterclaims, he should follow the Local and Federal Rules of Civil Procedure, including
13 providing a proposed Amended Answer and Counterclaims. He should again be aware that he
14 should plead his claims with particularity, as he has been warned in prior court orders. *See E.g.*
15 *Dkts. 39 and 48.*

16 **C. MOTION TO STRIKE**

17 QuinStreet's Motion to Strike (Dkt. 52) should be granted. The pleadings attached to the
18 Reply appear to relate to the dismissed counterclaims, and not to the issues raised by the
19 Summary Judgment Motion. Defendant should understand that this ruling does not bar these
20 pleadings from ever being filed, merely that they were improper as attachments to the Reply.

21 **D. DISCOVERY**

22 Defendant discusses some of QuinStreet's answers to written discovery. Dkt. 44 and 51.
23 If it is Defendant's intention to file a motion regarding discovery issues, he should again do so in
24 accord with the rules. It does not appear that Defendant made such a motion in the current
25 pleadings.
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- Defendant Ferguson’s Motion for Summary Judgment (Dkt. 44) **IS DENIED WITHOUT PREJUDICE**;
- QuinStreet’s motion pursuant to Fed. R. Civ. P. 56(f) (Dkt. 49) is **GRANTED**;
- Defendant’s Motion for Reconsideration of the Court’s Order dismissing his counterclaims (Dkt. 51) is **DENIED**; and
- QuinStreet’s Motion to Strike (Dkt. 52) is **GRANTED**.

DATED this 10th day of April, 2009.

ORDER
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